No. 05-259

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IN THE

Supreme Court of the United States

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae* The Chamber of Commerce of the United States of America

ANN ELIZABETH REESMAN
Counsel of Record
* LAURA ANNE GIANTRIS
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

* Admitted only in Maryland; practice supervised by Partners of the Firm

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The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae*. Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges reversal of the decision below and thus supports the position of Petitioner Burlington Northern & Santa Fe Railway Company before this Court.[1]

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 320 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

EEAC's and the Chamber's members are all employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. §§ 2000e *et seq.*, and other laws against employment discrimination and retaliation. As business enterprises in a competitive economy, these companies seek to maintain productivity, efficiency and discipline in their workplace operations. EEAC's and the Chamber's members, therefore, have a significant interest in the issue raised in this case, which puts in question whether an employer can be found to have retaliated against an employee in violation of Title VII simply by changing the employee's assigned job tasks in a way that does not result in any change

of job classification, pay or status, or by temporarily suspending the employee from service pending an internal investigation, after which the employee is restored to active service with no loss of pay or other adverse consequence.

The court below answered this question in the affirmative, essentially dispensing with the requirement that a Title VII retaliation plaintiff show a materially adverse employment action by the employer. In the lower court's broad view, unlawful retaliation can take the form of virtually "*any kind* of adverse action." Pet. App. at 22a. (citation omitted).

This issue is extremely important to the nationwide employer constituency that EEAC and the Chamber represent, and we have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of our experience in these matters, EEAC and the Chamber are well situated to brief the Court on the concerns of the business community and the significance of this case to employers. EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties.

STATEMENT OF THE CASE

When Burlington Northern & Santa Fe Railway Co. (BNSF) hired Sheila White in June of 1997 as a track laborer, she initially was given the responsibility of operating a forklift, along with other track laborer duties. Pet. App. at 3a. In September of that same year, White complained to management that her foreman treated her differently from male employees and had made two inappropriate remarks. Pet. App. at 4a. The company conducted an immediate investigation and then suspended the foreman without pay for

ten days and ordered him to attend sexual harassment training. *Id.*

During the investigation, BNSF heard complaints from other more senior employees that White was receiving preferential treatment. *Id.* More specifically, complaints centered on the fact that White was allowed to spend the majority of her workday operating the forklift, while track laborers with greater seniority were required to work exclusively on tracks. *Id.* In response to these complaints, BNSF gave the task of operating the forklift back to a more senior track laborer who had performed the function before White was hired. *Id.*

Approximately six months later, White apparently refused a direction from another foreman, and he temporarily suspended her for alleged insubordination, pending an investigation. *Id.* at 6a. After senior management concluded that the foreman had overreacted, BNSF lifted the suspension with full back pay and benefits. *Id.* at 7a.

White sued BNSF for sexual harassment and retaliation under Title VII. *Id.* The jury found in favor of BNSF on the sexual harassment claim, but found in White's favor on her retaliation claims. *Id.* BNSF moved for judgment as a matter of law or, in the alternative, for a new trial, contending that White had failed to establish retaliation under Title VII. *Id.* The district court denied the motion, and BNSF appealed that ruling to the Sixth Circuit. *Id.*

A panel of the Sixth Circuit reversed, finding that a minor adjustment in work assignments and a temporary suspension with full back pay and benefits did not constitute "adverse employment action[s]" and, therefore, were not actionable under Title VII. Pet. App. at 97a. White asked the full court to rehear her claim, and the court agreed to do so. *Id.* at 123a. The decision of the *en banc* court initially stated that the proper standard for determining what is an actionable adverse

employment action in the context of retaliation is whether the employer's action resulted in a "materially adverse change in the terms and conditions of [the person's] employment." *Id.* at 10a. (citation and footnote omitted). The court went on to conclude, however, that discriminatory retaliation can be "*any kind* of adverse action." *Id.* at 22a. (citation omitted). Applying this standard, the court then ruled that a temporary suspension, even one that is lifted with full back pay and benefits, as was the case here, constitutes a materially adverse change in employment. *Id.* at 22a-23a. The court also concluded that a simple change in an employee's job duties constitutes a materially adverse change in employment, even if the new duties are within the scope of his or her job classification and do not result in a loss of pay, benefits or status. *Id.* at 25a.

BNSF petitioned this Court for a writ of certiorari, which was granted on December 5, 2005.

SUMMARY OF ARGUMENT

At issue in this case is whether a claim of retaliation is actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, if the plaintiff did not experience a materially adverse change in his or her terms or conditions of employment as a result. The Sixth Circuit below, while paying lip service to the "materially adverse" standard, nevertheless ruled that the word "discriminate," as it appears in Title VII's anti-retaliation provision, means "*any kind* of adverse action." Pet. App. at 22a. (citation omitted).

A standard that makes actionable *any* adverse action infringes substantially on an employer's ability to run its business. Title VII was not intended to "'diminish traditional management prerogatives.'" *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). Few actions are more central to traditional management prerogatives than

assigning specific job tasks to be performed by employees and maintaining order and discipline in the workplace. Yet the decision of the Sixth Circuit below severely diminishes management's prerogatives in both of these critical areas.

Absent a "materially adverse" threshold, once an employee has complained of discrimination, virtually every subsequent change in that employee's assigned job duties becomes a potential basis for a retaliation claim under Title VII, even if all tasks assigned to the employee are within his or her existing job description and the employee suffers no reduction in pay or loss of status. By literally making a potential "federal case" of virtually every routine change in work assignments, such an interpretation of Title VII effectively would empower employees to pick and choose which of their assigned job functions they will perform, backing up their rejection of other assignments with threats of costly, time-consuming retaliation suits.

The decision below also would pose a dilemma for employers attempting to maintain workplace discipline. Employers are obligated to try to prevent sexual harassment, violence, illegal drug use and other serious workplace offenses. They also have a business responsibility to maintain order in the workplace. Customarily, the first step most employers take when an employee is suspected or accused of serious job misconduct, including insubordination, is to place the employee on temporary suspension or administrative leave pending an inquiry. If the inquiry confirms the employee's offense, the employer takes appropriate disciplinary action; otherwise, the employer lifts the suspension, usually without penalty or loss of pay. Without a materiality standard, employers would risk liability for retaliation any time they took this traditional approach in dealing with allegations of misconduct by an employee who previously had complained of discrimination. Thus, employers would be forced to make a Hobson's choice between allowing po-

tentially dangerous or disruptive individuals to remain in the workplace or temporarily suspending them pending investigation and thereby risking liability for retaliation.

Title VII's antiretaliation section should not be interpreted so as to impinge so severely on management's traditional prerogatives to assign work and administer discipline.

ARGUMENT

SOUND STATUTORY INTERPRETATION AND PUBLIC POLICY SUPPORT THE WIDELY-ACCEPTED VIEW THAT TITLE VII'S ANTI-RETALIATION SECTION APPLIES ONLY TO MATERIALLY ADVERSE EMPLOYMENT ACTIONS

A. A Materially Adverse Employment Action Is An Essential Element Of Unlawful Retaliation Under Title VII

Section 704(a) of the 1964 Civil Rights Act, commonly known as Title VII's "antiretaliation" section, makes it unlawful for an employer to discriminate against an employee because the employee has opposed a practice prohibited by Title VII or filed a charge with the Equal Employment Opportunity Commission (EEOC), given testimony, or otherwise participated in a proceeding under that statute. 42 U.S.C. § 2000e-3(a). To establish unlawful retaliation under Section 704(a), as the court below stated, a plaintiff must show: (1) that she engaged in an activity protected by Title VII; (2) that the employer took an employment action adverse to the plaintiff; and (3) that there was a causal connection between the protected activity and the adverse employment action. Pet. App. at 11a.

The dispute in this case centers on the second element in this formulation—*i.e.*, the requirement that a plaintiff show an "adverse" employment action by the employer. Although the federal courts of appeals are divided over the appropriate

standard for determining when an employer has unlawfully retaliated against an employee for the purposes of Title VII, the majority of courts have taken the sensible position that a person claiming retaliation must show some action that resulted in a "materially adverse change" in the terms and conditions of the person's employment. Pet. at 10-17. They further recognize that "materially adverse change" should parallel the requirement of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that a plaintiff show a "tangible employment action." The two courts that are the most consistent with *Ellerth* and *Faragher* have said that only adverse treatment with regard to some "ultimate employment decision"—such as hiring, granting leave, discharging, promoting, and compensating—can support a retaliation claim. *Brazoria County, Tex. v. EEOC*, 391 F.3d 685, 692-93 (5th Cir. 2004); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). Under this view, intermediate and temporary actions such as warnings, negative performance appraisals, and lateral reassignments generally cannot be used as the basis for retaliation claims.

Although the court below purported to apply the "materially adverse" standard, in reality it did not. Initially the court said that it rejected the view that *any* adverse treatment based on a retaliatory motive is unlawful. Later in the opinion, however, the court did a complete about-face, ruling that in the context of Title VII's retaliation provision, "the words 'discriminate against' literally mean '*any kind* of adverse action.'" Pet. App. at 22a. (citation omitted). Then, demonstrating just how broad it intended the standard to be, the court concluded that an employer commits unlawful retaliation by simply asking an employee to perform the job for which she was hired and by placing her on a temporary suspension pending an investigation into possible misconduct, even though the suspension was later lifted and the

employee fully compensated for time she was not at work. The Sixth Circuit has so diluted the "materially adverse" standard as to allow anything to satisfy it, thereby warranting reversal of the decision below.

B. The Requirement That A Retaliation Claimant Be Able To Show A Materially Adverse Employment Action Is Fully Consistent With Supreme Court Decisions Interpreting Title VII

This Court went to significant lengths in its *Ellerth* and *Faragher* decisions to make clear that its concept of "tangible employment actions" is limited to actions that have material, adverse effects on employees' terms or conditions of employment. In the Court's words:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment *with significantly different responsibilities*, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. at 761 (emphasis added). Indeed, the Court explicitly stated that "[a] tangible employment action in most cases inflicts direct economic harm." *Id.* at 762. To conclude that the Court intended this term to include inconsequential changes in job assignments of the sort involved in this case, as the court below has done, is a distortion of the Court's decisions.

Similarly, while the Court also recognized in *Ellerth* and *Faragher* that actions other than "tangible employment actions" can constitute unlawful discrimination under the "hostile environment" theory, it made clear in those decisions, as it has in the past, that to rise to the level of actionable discrimination under Title VII, the actions in question must be so "severe or pervasive" as to have "altered terms or conditions of employment." *Ellerth*, 524 U.S. at 752 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)).

Again, these references reflect the Court's recognition that Title VII does not address petty or routine workplace irritations or disappointments, but only actions sufficiently serious to adversely affect an employee's employment in a material way.

C. Unless A Materially Adverse Employment Action Is Required To Establish Unlawful Retaliation Under Title VII, Virtually Every Employer Action And Reaction Following A Complaint Alleging Discrimination Will Require Litigation

The rule that a plaintiff must show a materially adverse employment action to establish unlawful retaliation under Title VII distinguishes actual discrimination from mere unpleasantness and disappointment of the sort employees often experience in relations with their supervisors and managers. "'Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.'" *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) (quoting *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996)).

Every employee has the right to file charges with the EEOC and to oppose conduct he or she reasonably believes is unlawful under Title VII.[2] And every employee who has exercised these rights has the potential to become a retaliation plaintiff. EEOC statistics show that retaliation charges are now the fastest-growing category of charges filed under Title

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[2] Several courts have ruled that an employee's opposition to a practice the employee reasonably regards as a Title VII violation is protected under Section 704(a), even if the employee's belief is mistaken. *E.g.*, *Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

VII, having roughly doubled over the past decade.[3] If the courts do not keep the standard for establishing retaliatory conduct at a level that materially affects the employment relationship, these numbers can be expected to increase even more dramatically, with resulting effects on caseloads not only of the EEOC, but also of the federal courts themselves.

Section 704(a) is designed to assure that employees who exercise their Title VII rights do not suffer discrimination in employment as a result. It is not, however, designed to vaccinate such employees against legitimate discipline or supervisory control. "Engaging in protected activities or protected conduct should not put the plaintiff in a better position than she would be in otherwise." *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986) (citation omitted).

Employees who have accused their employers of discrimination are likely to view every subsequent action and reaction by their employers through a prism of suspicion and distrust. Given the costs of litigation, if every reassignment of tasks within their job classification could serve as a viable basis for a retaliation suit, such employees would have an effective veto power over routine work assignments and supervisory directives they did not happen to like. Such an interpretation of Title VII would be at odds with the fundamental purpose of the statute, which was not intended to "diminish traditional management prerogatives." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). The requirement that a retaliation claimant be able

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[3] The statistics reported on EEOC's website show that Title VII charges alleging retaliation increased from 10,499 in Fiscal Year 1992 to 20,240 in Fiscal Year 2004 and, during that same period, grew from 14.5 percent to 25.5 percent of all Title VII charges filed with the agency. EEOC Charge Statistics, FY 1992 Through FY 2004, *available at* http://www.eeoc.gov/stats/charges.html.

to show a materially adverse employment action prevents this unintended result, while assuring that employees' rights are protected.

Finally, the Sixth Circuit's unmanageably broad standard threatens to seriously undermine important relationships between employers and workers by fostering a work environment that is hyper-focused on confrontational legal action. Unlike typical tort and contract claims, employment controversies do not take place between strangers. Most labor and employment disputes involve individuals and companies with an ongoing relationship that began before the disagreement arose and in many cases is expected to continue after the parties' differences are resolved. Employers have a strong interest in preserving positive relationships with employees. Employers invest substantial funds, as well as the time and effort of a variety of personnel, in training each employee to do the best possible job. Simultaneously, employees invest their time, their effort, and considerable emotional capital in learning their craft and developing their careers. All of this can be destroyed irretrievably by the acrimony of drawn-out litigation.

It is largely for this reason—as well as the staggering legal fees often associated with employment litigation[4]—that many large companies have instituted in-house alternative dispute resolution programs aimed at resolving workplace conflicts

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[4] Even a victory in court can cost an employer hundreds of thousands of dollars. One survey showed that the average cost to an employer of litigating a seriously contested employment discrimination case is $130,000. Jacqueline R. DeSouza, *Alternative Dispute Resolution: Methods to Address Workplace Conflicts in Health Services Organizations*, Journal of Healthcare Mgmt. (Sept. 1, 1998), *available in* LEXIS, NEWS Library, ASAPII File, at *2. In addition to legal fees, employers embroiled in employment discrimination litigation also incur additional costs stemming from the time commitment of employees involved in the case as witnesses and the loss of substantial investment in the plaintiff as an employee.

quickly, more amicably and in ways that seek preserve these hard-won relationships. Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press 1997) at 113. Indeed, even Title VII itself encourages conciliation and resolution rather than litigation. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal").

By allowing employees to litigate virtually *any* inconsequential decision reached by an employer, even a temporary act intended to help the employer to make a better final employment decision, the EEOC and the court below discourage employers and employees from working through routine workplace disputes together, informally. The result inevitably will be that many of these disputes will end up like this one, with the parties at odds for many years at tremendous emotional and financial cost to both. Title VII's anti-retaliation section should not be interpreted so as to undermine relationships between employers and workers. Instead, that section is aimed at retaliatory actions that have material affects on terms or conditions of employment.

D. Neither A Reassignment To Different Tasks Within The Same Job Classification Nor A Temporary Suspension Pending An Internal Investigation Amounts To Discrimination Under Title VII

In this case, White claims that BNSF discriminated against her by relieving her of responsibility for operating a forklift so that she could perform other track maintenance work. Yet it is undisputed that both track maintenance and forklift work fell within the designated duties of her job classification

("track laborer"), that track maintenance responsibilities had always been part of White's job, and that the reassignment resulted in no change in her classification, rate of pay or benefits. Pet. App. at 95a. It is also undisputed that this minor change in daily work assignments did not result in White being treated differently or more harshly than other track laborers; all but one of White's colleagues performed track maintenance work full time with no opportunity to operate the forklift. Pet. App. At 88a-89a.

Assignment of tasks and responsibilities to individual employees has long been recognized in labor law as a fundamental prerogative of management. *See generally* ABA Section of Lab. & Empl. Law, *Elkouri & Elkouri: How Arbitration Works* 697-705 (Alan Miles Ruben, ed., BNA 6th ed. 2003), and authorities therein cited. Reassigning an employee to different duties within his or her existing job classification, without significantly changing pay or benefits, is not regarded as a sufficiently "material, substantial, and significant change" in terms or conditions of employment to require collective bargaining under the National Labor Relations Act. *E.g., Alamo Cement Co.*, 277 N.L.R.B. 1031 (1985) (footnote omitted); *see generally* 1 ABA Section of Lab. & Empl. Law, *The Developing Labor Law* 1220-23 (BNA 4th ed. 2000 & Supp. 2004). Thus, an employer's mere, routine exercise of the authority to assign or reassign job tasks to employees does not, without more, amount to a change in their employment status, compensation, terms, conditions, or privileges of employment, and therefore cannot constitute actionable discrimination under Title VII.

White also claims that BNSF discriminated against her by suspending her pending an internal inquiry into a supervisor's determination that she had been insubordinate. Yet it is undisputed that the suspension was only temporary, that the suspension was lifted upon completion of the inquiry, and that she ultimately suffered no loss of pay or benefits or other

employment-related detriment. Thus, again, no material adverse action had occurred.

Employers regularly conduct internal workplace investigations. Indeed, they are under ever-increasing legal pressure to do so. Under this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), an employer who fails to investigate a complaint of sexual harassment promptly and take appropriate steps to correct such harassment cannot use the affirmative defense to liability for sexual harassment by a supervisor that those cases established. Subsequent court decisions have extended this approach to allegations of racial harassment and other discriminatory practices, as well. *See, e.g., Hill v. American Gen. Fin., Inc.*, 218 F.3d 639 (7th Cir. 2000) (racial harassment); *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000) (racial harassment and retaliation); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998) (same). Employers also are obligated to conduct workplace investigations under the Occupational Safety and Health Act, 29 U.S.C. §.654(a)(1), the Drug-Free Workplace Act, 41 U.S.C. §§ 701-07, the Securities and Exchange Act, 15 U.S.C. §§ 78o(b)(4)(E) and 78o(f), and numerous other laws.

Many if not all employers also voluntarily adopt rules that establish minimum standards for employee conduct in the workplace. Safety concerns provide one important reason for having such rules. A worker who is fighting, threatening violence or merely engaging in horseplay that distracts other workers, or working carelessly or without protective equipment, can cause an accident, injuring himself, co-workers, and perhaps the public. In fact, where the work itself involves exposure to potentially dangerous machinery, toxic chemicals, or other hazardous materials, compliance with conduct rules becomes even more important. Other work rules are grounded in business concerns such as rules forbidding theft.

Where allegations of serious employee misconduct are at issue, a customary first step in conducting such internal investigations is to place the accused employee on temporary suspension or administrative leave pending the outcome of the inquiry. This gives the employer time to ascertain the facts and decide on an appropriate response, without risking the disruption or additional misconduct that could occur if the accused were allowed to remain in the workplace in the interim. In many instances, this preliminary step is necessary to prevent interference with the investigation itself. In some cases, too, it is necessary to remove an accused wrongdoer from the premises after the employer has been placed on notice of his or her alleged misconduct because failure to do so could expose the employer to liability for negligence, or worse, if the same individual were to commit subsequent actions that caused injury to coworkers, customers or others. The temporary suspension procedure thus protects important interests of the employer and others during the pendency of the investigation.

At the same time, the temporary suspension procedure does not adversely affect the employee because if the inquiry results in a determination that the allegations of misconduct were unfounded—or, as in this case, that a supervisor "overreacted"—the employer can lift the suspension and restore the employee's pay for the interim period, as BNSF did here. Thus, the suspension is merely temporary, and ultimately results in no adverse employment action at all, material or otherwise.

The court below specifically acknowledged the concern that employers maintain the prerogative to temporarily suspend employees who are suspected of wrongdoing pending an investigation, lest they be placed in the untenable position having to choose between keeping suspected wrongdoers in their workplace or facing potential Title VII liability. The court dismissed this concern, however, sug-

gesting employers may avoid liability simply by continuing to pay employees while they are on temporary suspension.

Unfortunately, leave with pay is not a workable solution. Where the employer discovers during the course of an investigation that a suspended employee has engaged in serious misconduct, many state wage payment laws would make it difficult—even impossible—for the employer to recover paychecks awarded the employee during the temporary suspension. *See, e.g.*, Cal. Lab. Code § 450; Md. Code Ann., Lab. & Empl. § 3-503. Accordingly, an employee found to have engaged in serious misconduct would be *rewarded* with paid time off before his well-deserved termination. Such a practice sends the wrong message both to the wrongdoer and other employees, as well as undermines the credibility of the employer's disciplinary process. It also leaves the door open for unscrupulous employees to abuse the system in order to secure additional paid time-off for themselves, further eroding the employer's efforts to prevent future misconduct.

Moreover, a policy of paying employees while they are on a temporary suspension is costly. Even an *unpaid* temporary suspension imposes significant financial and operational costs on an employer. If also required to pay wrongdoers for work not performed, employers might simply abandon the practice altogether, even when the suspected misconduct is serious. The likely result will be greater exposure to liability for employers for negligence and an overall increase in employment litigation. Ultimately, interpreting Title VII so as to cause employers to abandon this common and very sound business practice will disadvantage both employers and workers.

On the other hand, the employer's ability to maintain a safe, effective and orderly work environment is in no way compromised by a disciplinary process that temporarily suspends an employee without pay until such time as an internal investigation clears her of wrongdoing. Moreover,

having been fully compensated during the period of the temporary suspension, the employee receives what amounts to paid time off.

E. The EEOC's "Reasonably Likely To Deter" Standard For Cases Involving Alleged Retaliation Is Unmanageably Broad And Should Be Rejected

White repeatedly has argued for the adoption of an expansive definition of retaliation recently advocated by the Equal Employment Opportunity Commission (EEOC), which would hold an employer liable for "*any* adverse treatment" that is "reasonably likely to deter" someone from engaging in protected activity. EEOC Compl. Man. § 8 (1998) ("Retaliation") (emphasis added). Although the court below considered (and said it had rejected) the EEOC's interpretation of the law, it nevertheless went on to apply a standard that closely resembles the one espoused by that agency.

We respectfully ask the Court to reject the EEOC's flawed reading of the law. Informal guidance documents, such as the Compliance Manual section containing the EEOC's views on retaliation, are not entitled to deference under *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984), but merely to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and then only to the extent that they have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). In determining what level of respect is to be accorded administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (citations and internal quotations omitted).

Applying the *Skidmore* factors to the EEOC's interpretation, the agency's view lacks any persuasive authority and therefore is not entitled to respect from this Court. As an initial matter, we note that the EEOC's "reasonably likely to deter" standard is new and represents a significant departure from its earlier policy pronouncements. The agency announced this broad standard for retaliation cases for the first time in 1998 when it published revisions to its Compliance Manual—the official "guidebook" for EEOC investigators on analyzing, investigating and resolving employment discrimination charges. EEOC Compl. Man. § 8 (1998) ("Retaliation" ¶ 8008). Before 1998, when the events that gave rise to this case first transpired, the agency approached retaliation cases the same way it did all other types of discrimination cases. Back then, the Compliance Manual instructed investigators that a *prima facie* case of retaliation can be shown in "more or less the same manner as a charge or complaint filed on any other basis under Title VII or the ADEA." EEOC Compl. Man. § 614 (1988) ("Retaliation").[5] The only "one difference" between a retaliation case and those involving other types of discrimination, the agency said at the time, is that retaliation cases are sometimes "more difficult" to prove.

The EEOC does not attempt to account for its sudden departure from its earlier (and we think more accurate) reading of Title VII, and its new standard is both wrong and unworkable for employers. Allowing employees to sue employers for insignificant acts that have no material, adverse effect on terms or conditions of employment seriously undermines the ability of employers to manage and maintain relationships with workers and will lead to increased charge filing and litigation. Moreover, the new EEOC standard is a *subjective* one, with employer liability hinging in large part

[5] A copy of the superseded EEOC Compliance Manual Chapter on "Retaliation" is available at the National Archives.

on the employee's personal reaction to even a slight disagreement or affront. Although the agency says it would exclude "petty slights and trivial annoyances" from the definition of actionable retaliation because such acts are not "reasonably likely to deter" a person from engaging in protected activity, the examples of actionable retaliation offered in the manual illustrate just how difficult it is to discern actionable from non-actionable retaliation when the conduct involved is not from an objective standpoint materially adverse.

The EEOC says in one example, for instance, that actions such as excluding an employee from invitations to lunch regularly extended to other employees would constitute unlawful retaliation. It does not suggest, however, that the worker's employment opportunities were in any way impacted by this exclusion. Giving employees virtually complete control over employer liability for retaliation in this way will render employers defenseless against many such claims and make it difficult—even impossible—to prevent them, a result that surely frustrates Title VII.

CONCLUSION

For the reasons set forth above, the *amici curiae* Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit that the decision below should be reversed.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States of America

ANN ELIZABETH REESMAN
Counsel of Record
* LAURA ANNE GIANTRIS
MCGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

* Admitted only in Maryland;
practice supervised by
Partners of the Firm